

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-7059

In The
United States Court of Appeals
For The Second Circuit
RELAXATION PLUS COMMODORE, INC.

Plaintiff-Appellant.

-against-

REALTY HOTELS, INC., THE HONORABLE HOWARD THOMPSON, Individually and as Administrative Judge of the Civil Court of the City of New York, and "John Doe" (Fictitious name) individually and as City Marshal of the City of New York,

Defendants-Appellees.

**BRIEF OF REALTY HOTELS, INC.,
APPELLEE**

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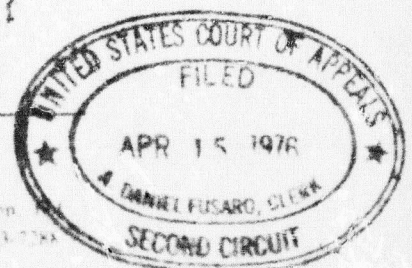


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UNITED STATES COURT OF APPEALS
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-against-

REALTY HOTELS, INC., THE HONORABLE
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Administrative Judge of the Civil Court
of the City of New York, and
"John Doe" (Fictitious name) indivi-
dually and as City Marshal of the City
of New York,

BRIEF OF REALTY
HOTELS, INC.,
Appellee

Docket No. 76-7059

Defendants-Appellees.

-----x
ISSUES PRESENTED FOR REVIEW

1. Does Plaintiff have standing to question the constitutionality of the New York State Criminal Prostitution Statutes (New York State Penal Law Sections 230 et seq.) when the Plaintiff is neither indicted nor threatened with indictment for violation of these statutes?

2. Where the Complaint does not allege any illegal or unconstitutional acts by a state officer, does a case or controversy exist between the state officer and Plaintiff such as to invoke the provisions of 28 U.S.C. Section 2281?

3. Where the state court proceedings sought to be enjoined by the Plaintiff may not be characterized as bad faith harassment of the Plaintiff in the exercise of its federally protected rights, is Plaintiff's suit for declaratory judgment and injunctive relief barred by 28 U.S.C. 2283?

4. Do the state proceedings attempted to be stayed by the Plaintiff involve a substantial federal constitutional question?

STATEMENT OF THE CASE

This action was brought by Plaintiff for a declaratory judgment that Sections 230.00 et seq. of the New York Penal Law, Section 352 of the New York Multiple Dwelling Law, Section 231.1 of the New York Real Property Law, and Section 711 (5) of the New York Real Property Actions and Proceedings Law are unconstitutional on their face and as applied in violation of the First, Ninth and Fourteenth Amendments of the United States Constitution; and for an injunction prohibiting the Defendants from enforcing the said statutes for the purpose of evicting the Plaintiff from premises occupied by it in the Commodore Hotel, New York City, New York.

In support of its action, the Plaintiff moved by Order to Show Cause for a preliminary injunction and for the convening of a three judge District Court pursuant to 28 U.S.C. 2281. The court below, Judge Henry F. Werker, presiding, denied the application and dismissed the complaint.

FACTS

(References to page numbers of the Appendix refers to those numbers appearing at the top of each page of the Appendix; numbers appearing in the lower part of the pages are to be disregarded.)

During the month of March 1972, the Plaintiff and the Defendant, REALTY HOTELS, INC. (hereinafter sometimes called "REALTY HOTELS") entered into a written lease whereby Plaintiff leased from REALTY HOTELS, for a term of ten (10) years, a portion of the mezzanine floor of the Hotel Commodore for use as a "health spa" (4a). On or about October 25, 1974 Realty Hotels instituted a summary proceeding in the Civil Court of the City of New York, County of New York, to evict the Plaintiff from the said premises on the ground that the Plaintiff was using the demised premises for prostitution purposes (8a, 9a). After a trial before a Jury which commenced on December 17, 1974, a verdict was rendered in favor of Realty Hotels, Inc. and a Judgment of Eviction was entered against Plaintiff, which Judgment was subsequently affirmed unanimously by the Appellate Term of the Supreme Court of the State of New York, First Department and by the Appellate Division, First Department (10a, 12a). The Plaintiff then made a motion before the Appellate Division for leave to appeal to the New York State Court of Appeals, and upon the denial of this motion, the Plaintiff nevertheless filed a Notice of Appeal to the New York State Court of Appeals claiming an appeal as a matter of right on the alleged ground that the proceedings in the Courts below violated the Plaintiff's rights under the New York State

1/
Constitution (42a). Within days after the filing of the notice of appeal with the New York State Court of Appeals, the plaintiff instituted the within action to enjoin the State Courts from going forward with the eviction proceedings. Plaintiff's complaint alleges not only the unconstitutionality of the cited New York State statutes, but also claims that it was deprived of due process in that a Bill of Particulars in the summary proceeding was served upon it the day of the trial, and on the further ground that there was a conspiracy by the Courts of New York State to discriminatorily apply and enforce the laws of that State against plaintiff in the eviction proceedings.

- 1/ Subsequent to the institution of this Federal Court action, the New York State Court of Appeals dismissed plaintiff's appeal on the ground that no substantial constitutional question was involved.

POINT I.

THE CLAIMED DENIAL OF DUE PROCESS
AND DISCRIMINATORY ENFORCEMENT OF
STATE LAW WILL NOT SUPPORT PLAINTIFF'S
APPLICATION FOR AN INJUNCTION UNDER
28 U.S.C. Section 2281

Plaintiff, in its complaint and brief, expounds at great length upon its claim that it was denied due process in the Trial Court's refusal to grant an adjournment of the trial when the Bill of Particulars was served one hour prior to jury selection, and that the state courts conspired to enforce the Laws of New York State against the plaintiff in a discriminatory fashion. In addition to the obvious lack of merit of these ^{1/} contentions, these allegations do not afford grounds for the convening of a three judge District Court pursuant to 228 U.S.C. 2281.

A three judge District Court is mandated by that Statute only where an injunction is sought restraining the en-

- 1/ As the plaintiff points out in its complaint, it served a demand for a Bill of Particulars in the State Court action on or about October 25, 1974, and the Bill of Particulars was served on the date of trial approximately 53 days later, on December 17, 1974. Plaintiff makes no explanation for its failure to move for an Order of Preclusion during this entire fifty three day period of time (Rule 3042, N.Y.S. CPLR) instead of asking for an adjournment of the trial of the summary proceeding which is supposed to deal expeditiously with eviction suits. With respect to plaintiff's claim of a conspiracy against the plaintiff on the part of the Courts of the State of New York, little need be said, except that the plaintiff has alleged absolutely no facts to warrant such an absurd claim.

enforcement of a State Statute on the ground of the Statute's unconstitutionality. Where there is no claim of unconstitutionality of a statute, Section 2281 does not apply. (Moore's Federal Practice, Vol. 1A, Part 2, p.2238, and cases cited thereat).

Accordingly, the only possible ground for invoking Section 2281 is plaintiff's claim of the unconstitutionality of Penal Law 230 et seq. of the State of New York. And for the reasons set forth herein, it is respectfully submitted that there is no merit in any such claim.

POINT II.

PLAINTIFF DOES NOT HAVE STANDING
TO RAISE THE QUESTION OF THE CON-
STITUTIONALITY OF THE NEW YORK STATE
CRIMINAL PROSTITUTION STATUTES
(PENAL LAW SECTIONS 230 et seq.)

Plaintiff makes no claim that it is threatened with criminal prosecution for violation of Penal Law Sections 230 et seq., or that such prosecution is likely or even possible. It hardly requires the citation of authority for the proposition that the constitutionality of a statute cannot be drawn in question unless there is "litigation between adverse parties the disposition of whose rights inescapably require the passing on the validity of the statute". Mendez v. Heller, 380 F. Supp. 985, 990 (S.D.N.Y. 1974).

The state court proceeding which is sought to be enjoined in this action does not involve the criminal prosecution

of the plaintiff under Penal Law Section 230 et seq., but was simply an action to evict the plaintiff under New York State Real Property Actions and Proceedings Law Section 711 (5). The plaintiff has, therefore, simply no standing to contest the constitutionality of Penal Law Section 230 et seq. since there was no case or controversy in the State Court with respect to that statute. The claimed "chilling effect" of the statute, even if it were true, would not be sufficient to bring into play the equity jurisdiction of the Federal Court to enjoin the pending State proceeding where there is no case or controversy involving that statute. Younger v. Harris 401 U.S.37,42.

POINT III.

THE COMPLAINT DOES NOT ALLEGE A
CASE OR CONTROVERSY BETWEEN A
STATE OFFICER AND THE PLAINTIFF
SUCH AS TO INVOKE THE PROVISIONS
OF 28 U.S.C. Section 2281.

28 U.S.C. Section 2281 refers specifically to injunction proceedings restraining the enforcement by a state officer of an allegedly unconstitutional state statute. However, the complaint fails to allege that any state officer is attempting to enforce the provisions of Penal Law Sections 230 et seq. Although Judge Edward Thompson is named as a party-defendant in this lawsuit, the complaint is completely devoid of any allegation of impropriety on the part of Judge Thompson. Indeed, other than in the caption of the case and in the description of Judge Thompson's

duties as administrative head of the Civil Court of the City of New York, the complaint makes absolutely no mention of Judge Thompson with respect to the litigation between the plaintiff and Realty Hotels. No cause of action is alleged against Judge Thompson, and it is apparent that the plaintiff has named him as a party-defendant for the sole purpose of attempting to comply with the provisions of Section 2281. But it is respectfully submitted that in the absence of any allegations that Judge Thompson is attempting to enforce or execute an unconstitutional statute, the complaint and plaintiff's application under Section 2281 must fail.

POINT IV

PLAINTIFF'S SUIT FOR A DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF IS BARRED BY 28 U.S.C. 2283.

Title 28 U.S.C. Section 2283 provides:

"A Court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment."

It has been held that the Section 2283 prohibition against a stay of "proceedings" in a State Court "...includes all steps taken or which may be taken in the State Court or by its officers from the institution to the close of the final process.... It applies to Appellate as well as to original proceedings.... It applies alike to action by the Court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceedings supplemental or ancillary taken with a view

to making the suit or judgment effective....Thus the prohibition applies whatever the nature of the proceedings, unless the case presents facts which bring it within one of the recognized exceptions to Section [2283]." Hill v. Martin 296 U.S.393,403.

Moreover, the statute covers either an injunction against a State Court or party, and its prohibition is not avoided by framing an injunction as a restraint on a party litigant rather than directly against the State Court itself. Oklahoma Packing Co. v. Oklahoma Gas & Electric Co. 309 U.S.4.

Although a so-called "Civil Rights Proceeding" under Title 42 U.S.C. Section 1983 is generally held to be an exception to the anti-injunction provisions of Section 2283, it has been held that such exception exists only in those cases in which the State Court proceedings may be characterized as bad faith harassment of the defendant in the exercise of its federally protected rights. Younger v. Harris, 401 U.S. 37; Mitchum v. Foster 407 U.S. 225.

Although the Younger case involved the propriety of Federal Court intervention in pending state criminal prosecutions, the Supreme Court extended the rule of Younger v. Harris to a state civil proceeding in the case of Huffman v. Pursue, Ltd., 420 U.S. 592. The Huffman case and the case at bar are similar in that they both involved state sanctions against the use of real property for certain proscribed sexual activity. In the Huffman case, the state statute invoked provided that a place exhibiting an obscene film was to be closed for up to one year, in addition to other sanctions. It was held in that case that the principles

of Younger were applicable even though the state proceeding was civil in nature, and that the District Court should have applied the tests laid down in Younger in determining whether to proceed to the merits and should not have entertained the action unless it was established that the state proceeding was conducted with a bad faith intent to harass the defendant.

In the case at bar, there is no claim of bad faith harassment of the plaintiff by the state court or by the state officials, and accordingly the principles laid down in Younger v. Harris would preclude an action under Section 2281 to enjoin the state court proceeding. The plaintiff's claim of "conspiracy" by the trial court, Appellate Term and Appellate Division^{1/} to deprive the plaintiff of its constitutional right is, as Judge Werker pointed out in his decision, patently absurd. Plaintiff attempts to support its claim of "conspiracy" by asserting that the state courts have refused to apply to its case the rules of law which plaintiff believes to be applicable. In effect, plaintiff would have the Federal Court substitute its judgment of the State Law to be applied, in place of the law applied by the State Courts. However, the "principles of equity, comity, and federalism" must restrain the Federal Court from interfering with the judgment of the State Court. Mitchum v. Foster 407 U.S. 225, 243; Rizzo v. Goode - U.S. -, 46 L.Ed. 2d 561, 574. And even if the State Courts

1/ Since the New York State Court of Appeals has dismissed plaintiff's appeal from the Appellate Division Order, presumably the Judges of the Court of Appeals (as well as Judge Werker) have joined in the "conspiracy".

had in fact made an erroneous decision, there could be no claim of deprivation of property without due process of law where the parties have been fully heard in the regular course of judicial proceedings. Bonner v. Gorman 213 U.S. 86.

POINT V.

THE STATE PROCEEDINGS ATTEMPTED
TO BE STAYED DO NOT INVOLVE ANY
SUBSTANTIAL FEDERAL CONSTITUTIONAL
QUESTIONS.

Even if this application were not barred by 28 U.S.C. Section 2283 and the principles of the Younger case, the case at bar still would not be one which would justify the extraordinary relief provided by 28 U.S.C. Section 2281. It has been held that Section 2281 requires a three judge court only where the claim of unconstitutionality of the state statute involves a federal issue that is both substantial and unsettled. Ex parte Poresky 290 U.S. 30 (1933). In the case at bar, the question of the constitutionality of the New York State Criminal Prostitution Laws was not, and did not need to be, reached by the state courts in granting the application for eviction. This was so, since the statutes under which the Judgment of Eviction was sought and obtained set forth grounds for eviction independent of the criminal prostitution statutes. The summary proceedings statute of the State of New York under which these proceedings were brought was Real Property Actions and Proceedings Law Section 711 (5), which provides as follows:

"...A special proceeding may be maintained

under this article upon the following grounds:

...
5. The premises, or any part thereof, are used or occupied as a bawdy-house, or house or place of assignation for lewd persons, or for purposes of prostitution, or for any illegal trade or manufacture, or other illegal business."

New York Multiple Dwelling Law Section 352, which was also relied upon in the state court eviction proceedings provides as follows:

"If a multiple dwelling, or any part thereof, shall be used as a house of prostitution or assignation with the permission of the lessee or his agent, the lease shall be terminable at the election of the lessor, and the owner shall be entitled to recover possession of said premises by summary proceedings."

It is apparent, then, that the statutes under which the eviction proceedings were maintained did not require that the proscribed activity giving rise to a ground for eviction be an illegal activity. To be sure, Section 711 (5) provides for eviction where the premises are used for an illegal trade, manufacture or business, but in addition thereto it specifically provides for eviction if the premises are used for prostitution purposes. If it had been the intention of the New York State Legislature that Section 711 (5) gave grounds for eviction only where the acts of prostitution were illegal, then it would have been superfluous to include the words "as a bawdy-house, or house or place of assignation for lewd persons, or for purposes of prostitution" in that section of the statute, since illegal prostitution would be embraced in the last two clauses of the section. Similarly, Section 352 of the Multiple Dwelling Law gives grounds for eviction by summary proceedings where the premises are used for prostitution purposes inces-

pective of the criminality of the acts of prostitution committed. It is therefore apparent that there is no merit to plaintiff's claim, set forth at page 46 of its brief, that the eviction of the plaintiff cannot be sustained if the criminal prostitution statutes of New York State are unconstitutional. Where summary proceedings are brought under Section 711 (5) RPAPL and Section 352 MDL on the ground that the tenant is using the premises for purposes of prostitution, the cited statutes do not require that there be a finding of criminal prostitution under Penal Law Section 230 to sustain the eviction. Accordingly, even if it were to be found, in a proper case, that Penal Law Section 230 was unconstitutional, the eviction could still be maintained, since the statutory grounds for eviction are independent of Penal Law Section 230. The question of constitutionality of Penal Law Section 230 need, therefore, not be reached in this litigation. Under the circumstances, where the state proceeding sought to be enjoined is not directly attributable to the statute attacked as unconstitutional, the provisions of 28 U.S.C. 2281 are inapplicable. Ex parte Bransford, 310 U.S. 354, 361 (1940).

CONCLUSION

The plaintiff has no standing to attack the criminal prosecution statutes of the State of New York since there is no case or controversy, affecting the plaintiff, in which these statutes are involved. The plaintiff has neither been indicted nor threatened with indictment under those penal statutes. The

controversy between the plaintiff and Realty Hotels arises out of a simple eviction proceeding based upon grounds independent of the criminality or illegality of the acts of prostitution permitted by the plaintiff in the demised premises.

Absent a showing of a substantial federal question concerning the constitutionality of the statute attacked, and absent a showing of bad faith harassment in the enforcement of such statute, relief under 28 U.S.C. 2281 is inappropriate.

Plaintiff's frivolous claims of constitutional issues are nothing more than an attempt to have the federal courts sit in appellate review of the state court proceedings where the only issues involved were construction of the state statutes and questions of fact.

Under the circumstances, the lower court properly dismissed the complaint.

Respectfully submitted,

WOHL, LIPTON, LOEWE, STETTNER,
BECKER & KRIM, ESQS.
Attorneys for Appellee,
REALTY HOTELS, INC.

Leonard H. Krim,
of counsel

CERTIFICATE OF SERVICE

The undersigned, an attorney admitted to practice before the bar of this court, certifies that a copy of within papers was served this day upon all parties in interest by ordinary mail, ~~by hand~~.

Dated: April 14, 1976

Gary Mailman

BEST COPY AVAILABLE

RELAXATION PLUS COMMODORE, INC.,

Plaintiff - appellant

- against -
REALTY HOTELS., INC.,

Defendants - appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

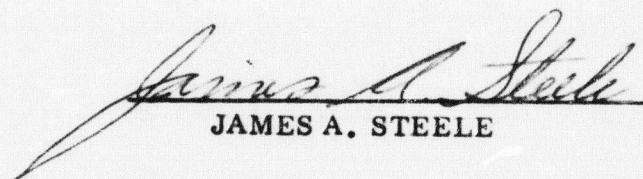
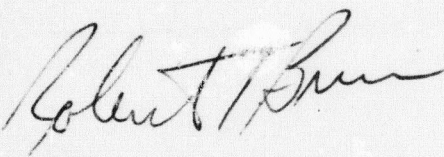
ss.:

I, James A. Steele, being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
310 West 146th Street, New York, New York

That on the 15th day of April 19 76 at 1) 122 East 42 Street, New York, New York
2) Two World Trade Center, New York, New York
deponent served the annexed Brief upon

1) Kassner & Detsky
2) Louis Lefkowitz
the Attorneys in this action by delivering ² true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 15th
day of April 19 76


JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1972